256 Food Corporation d/b/a Met Food; and its Golden State successor, Bafter Food Corporation *and* United Food & Commercial Workers Local 1500, AFL–CIO. Cases 2-CA–30788, 2-CA–30862, 2–CA–30905, 2–CA–30986, 2–CA–31025, and 2–CA–31170.

December 20, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On February 16, 2000, Administrative Law Judge Steven Davis issued the attached supplemental decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception[2] and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[3] and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions, and to adopt the recommended Order as modified.[5]

In adopting the judge's finding that discriminatee Jose De la Cruz' job at Key Food was not substantially equivalent to his job at Met Food before he was unlawfully discharged on September 13, we note that the judge found that De la Cruz earned $6.50 per hour and $325 per week at Met Food in his predischarge job (on the basis of a 50-hour workweek).

By contrast, the judge found that De la Cruz was paid $5.50 per hour at Key Food and worked there for about 1-1/2 weeks. The General Counsel contends that the judge's finding that De la Cruz earned $460 at Key Food is erroneous, and asserts that De la Cruz actually earned $324.50. The record reflects that De la Cruz' earnings at Key Food were, in fact, $324.50. As the General Counsel asserts, this is essentially consistent with De la Cruz' credited testimony that he worked at Key Food for about a week and a half: at $5.50 an hour, De la Cruz would have had to work 59 hours to have earned $324.50 at Key Food.

Thus, absent evidence that De la Cruz did not work a 40-hour workweek at Key Food, we shall assume that he worked 40 hours per week. At $5.50 per hour, De la Cruz earned approximately $220 per week at Key Food. This amounts to just 68 percent of what De la Cruz earned per week at Met Food, and demonstrates—along with the $1 per hour disparity in his hourly wages at Met Food compared to Key Food—that his job at Key Food was not substantially equivalent to his job at Met Food.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified, and orders that the Respondent, 256 Food Corporation d/b/a Met Food, Bronx, New York, its officers, agents, successors, and assigns, shall, jointly and severally, with its successor, Bafter Food Corp., Bronx, New York, its officers, agents, successors, and assigns, make whole the employees named below by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

Domingo Almonte	$3,276.22
Pascual Alonzo	4,342.55
Miguel Ayala	9,004.73
Wandy Cepeda	8,648.53
Jose De la Cruz	12,979.96
Marisol Chavez Frias	7,127.00
Jose Frometa	892.92
Juan Lopez	13,233.36

[1] On March 10, 2000, the judge issued an erratum correcting his inadvertent omission of the attorneys' appearances in this case.

[2] The General Counsel contends in his cross-exception that the judge failed to include discriminatee Aleida Torres and the amount of backpay due her in his recommended Order. In this regard, the General Counsel contends that the compliance specification and notice of hearing included Torres and computed the backpay due her for the period of September 13, 1997, through September 29, 1997, as $240 plus interest. The General Counsel further contends that the Respondent conceded in its posthearing brief that Torres is due this amount of backpay.

In its answer, the Respondent admitted that Torres was due backpay for the period referred to above in the amount of $220. However, the Respondent subsequently conceded in the appendix attached to its posthearing brief that the amount of Torres's backpay is $240. In light of the Respondent's answer and posthearing brief, we grant the General Counsel's cross-exception and find that Torres is due backpay in the amount of $240. We shall modify the judge's recommended Order accordingly.

[3] No exceptions were filed with respect to the judge's findings (1) regarding discriminatees Domingo Almonte, Pascual Alonzo, Miguel Ayala, Wandy Cepeda, Marisol Chavez Frias, Jose Frometa, and Francisco Urena; and (2) regarding the method chosen to calculate gross backpay.

[4] In adopting the judge's finding that discriminatee Juan Lopez' backpay should not be tolled, Chairman Hurtgen finds that the circumstances of Lopez' job search, and his decision to remain in a part-time job, are distinguishable from *Acme Bus Corp.*, 326 NLRB 1447 (1998), wherein he dissented. In *Acme Bus*, the employee had the opportunity, and declined, to work two part-time jobs, the functional equivalent of a full-time job. In Lopez' case, there is no showing that he was offered full-time work (or 2 part-time jobs). Therefore, there was no willful declination. Further, the Respondent has not shown that there were full-time jobs available for Lopez.

[5] As stated above, we have modified the judge's recommended Order to include discriminatee Torres and the backpay due her. We have also modified the recommended Order to include the total amount of backpay. Finally, we have modified the recommended Order to reflect that Met Food and its *Golden State* successor Bafter Food Corp. are jointly and severally liable for the backpay remedy. See, e.g., *AC Electric*, 333 NLRB No. 120 (2001).

Aleida Torres	240.00
Francisco Urena	6,110.68
TOTAL BACKPAY:	65,855.95

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Burt Pearlstone, Esq., New York, NY. for the General Counsel.
John Diviney, Esq., Portnoy, Messinger, Perl & Associates, Syosset, NY, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge: On March 1, 1999, the National Labor Relations Board issued its Decision and Order approving a Settlement Stipulation reached by the parties, directing 256 Food Corporation d/b/a Met Food to reinstate and make whole its employees Domingo Almonte, Pascual Alonzo, Miguel Ayala, Wandy Joel Cepeda, Jose de la Cruz, Marisol Frias, Jose Formeta, Juan Lopez, Aleida Torres and Francisco Urena, for losses resulting from Met Food's unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. On April 23, 1999, the United States Court of Appeals for the Second Circuit issued its Judgment enforcing the Board's Order in full.

A controversy having arisen over the amount of backpay due the discriminatees, on May 27, 1999, the Regional Director for Region 2 issued a Compliance Specification and Notice of Hearing. At the hearing, the Specification was amended. Respondent timely filed an answer to the Specification.[1]

A hearing was held before me on October 4 and 5, 1999 in Manhattan. Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and the Respondent, I make the following

FINDINGS OF FACT

Legal Principles

The employees involved herein were the subject of a mass discharge which occurred on September 13, 1997, and were later reinstated on September 29, 1997.

The Board's "objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restructuring the circumstances that would have existed had there been no unfair labor practices." *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998). "Any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. The formula should be representative of the discriminatee's employment history and take into account intermittency of employment. The backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved." *La Favorita, Inc.*, 313 NLRB 902, 903 (1994). The Board's discretion is broad in its selection of a backpay formula that is reasonably designed to produce approximations of backpay due. *Regional Import & Export Trucking Co.*, 318 NLRB 816, 821 (1995).

Board compliance officer Esther Morales testified that she computed the gross backpay of the discriminatees based upon their weekly salary at the time of their discharge on September 13, 1997. Such figures were obtained by interviewing each of the discriminatees. Each was paid in cash and they received no pay stub or other written record of their earnings.

Morales asked each employee how many hours he or she worked, and whether the amount of money received was the same each week. Most replied that they received the same amount most of the time, but when they worked fewer hours they received less pay.

The payroll records of Respondent Met Food were not produced although they had been requested by the compliance officer.

I accordingly find and conclude that the method chosen to calculate gross backpay was a reasonable one. In the absence of payroll records or of written documentation given to the employees, their recollection of their earnings during their employment is the most reliable, and the only reliable method of determining what they earned while employed. The compliance officer reasonably assumed that their earnings during the backpay period would have been the same as their earnings prior to their discharge. *Bridgeway Oldsmobile*, 294 NLRB 858, 860 (1989). Thus, the weekly earnings of the discriminatees during their employment with Respondent constitutes a reasonable approximation of what the discriminatees would have earned had they continued to work for Respondent during the backpay period. The amount of earnings prior to the start of the backpay period is an appropriate, accepted measure of determining gross earnings during the backpay period. *A-1 Schmidlin Plumbing Co.*, 312 NLRB 191 (1993).

Once the General Counsel has shown the gross backpay due in the Specification, the employer bears the burden of establishing affirmative defenses which would mitigate its liability, including willful loss of earnings and interim earnings to be deducted from any backpay award. *La Favorita*, supra. A discriminatee must make reasonable efforts to secure interim employment in order to be entitled to backpay. The burden is on the Respondent to establish that the employee failed to exercise reasonable diligence in searching for work. "The Board emphasized that the standard is that of reasonable diligence, not the highest diligence, [and] that the sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of

[1] At the hearing, Respondent admitted the Specification's allegation that Bafter Food is a *Golden State* successor to Met Food and is liable to remedy the unfair labor practices of Met Food, including the obligation to make whole the discriminatees. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). That allegation had been previously denied.

the backpay period." *Basin Frozen Foods*, 320 NLRB 1072,1074 (1996).

Employees testified concerning their interim earnings. In most cases, those earnings were supported by pay stubs provided to General Counsel prior to the hearing, who has considered them in preparing the amended Specification which was issued on September 29, 1999. Complete backpay calculations are contained in the Appendix. [2]

Domingo Almonte

Prior to September 13, Almonte earned $325 per week for a 72 hour work week. Upon his reinstatement in late September, he earned $5.15 per hour, and worked 36 to 38 hours per week until his second discharge in late December, 1997. The parties stipulated that Almonte's interim earnings at Respondent during the fourth quarter of 1997 were $2,288.26.

Following that discharge, in December Almonte obtained part time work at Key Food where he worked 28 to 29 hours per week at a rate of $6.00 per hour where he is still employed. In about June, 1998 he received a salary increase to $7.15 per hour.

In May, 1998, while working at Key Food, Almonte obtained a second job, at Field Marketing, where his starting wage was $7.00 per hour. He continued to work at both jobs through the end of the back pay period, March 4, 1999.

Pascual Alonzo

Alonzo testified that he worked at Respondent Met Food for nearly 1 year before his discharge on September 13, 1997. He earned $185 per week for a 38 hour week.[3] He made the same amount each week and always worked the same number of hours with the same schedule. Although he stated that his wages varied occasionally if he worked fewer hours, he did not earn less than $185 per week.

Following his reinstatement on September 29, Alonzo earned wages of $145 per week although he worked the same number of hours as he had prior to September 13. The parties stipulated that Alonzo earned $1413.61 in the fourth quarter of 1997.

On March 4, 1999, the store was purchased by Fernando Batista who operated the facility as Respondent Bafter. Alonzo continued to receive the same wage until July 1, 1999 when he received a raise to $350 per week, and promotion to dairy manager.

Batista testified that Alonzo worked only part-time after school for about 4 or 5 hours per day. Batista further stated that in early April, 1999, he paid Alonzo about $40 in cash each week in addition to his regular wages. Batista could not recall the exact amount of the extra payment, and also had no records of paying those sums to Alonzo until early July when he began paying him a salary of $350 per week. Alonzo denied receiving any additional wages in addition to the $145 he received from September 29, 1997 through June 30, 1999. I credit Alonzo's denial of receipt of any more than $145 per week. Batista's testimony is not supported by any documentation, which would be expected from a business operation. In addition, he was not certain as to the exact amount of those payments. Accordingly, I find that It was only when Alonzo was promoted to manager in July, 1999 that he received the raise in pay.

Respondent argues that Alonzo must have received a raise in pay in March, 1999 because his co-worker, Francisco Urena received a raise at that time. Although the 2 workers are similarly situated in that they both were continuously employed following their reinstatement on September 29, that does not prove that both received a raise. Respondent argues that it would make no sense for it to increase the wage of Urena but not Alonzo. That may be true, but there is no credible evidence to support a finding that Alonzo received such a raise in pay.

The Specification, which issued in May, 1999, states that Alonzo's backpay would continue to accrue until his weekly salary was "properly adjusted." Inasmuch as he received a salary of $350 on July 1, 1999 and has continued to earn that salary which is more than his weekly earnings at Respondent Met Food, his backpay terminates with the beginning of the third quarter of 1999.

Miguel Ayala

Ayala earned $300 per week at Respondent Met Food prior to his discharge on September 13. He worked 10 to 12 hours per day, 6 days per week.

Following his reinstatement in late September, he worked for about 1 month, and then, on October 20, was given a letter by Respondent asking that he bring, within 72 hours, his "documentation or legal working permit" from the Immigration and Naturalization Service (INS). Ayala stated that prior to this occasion he had never been asked by Respondent during his 3-year tenure with the company to provide such information. Ayala was discharged on October 22. It was stipulated that his earnings in the fourth quarter of 1997 were $545.27.

Ayala stated that from October, 1997 through the time of the hearing he was not legally authorized to work in the United States. When he was asked by Respondent on October 20 to provide legal documentation concerning his ability to work in this country he was not able to do so.

Ayala testified that following his discharge on October 22 he looked for work by reading advertisements in El Diario newspaper, and he called his friends and others and asked if they knew of businesses that were seeking employees. Although he lived in Manhattan he traveled to Queens and the Bronx searching for work. He visited supermarkets including Associated, Bravo, C-Town, Super Extra and supermarkets located at 200th Street, and at 185th Street. He also visited the Sam Miguel Grocery. He limited his search to supermarkets, which was his expertise. During these visits, Ayala asked for work. He was never offered an application, but he was asked to leave his phone number. He did so, but was not called for work.

Ayala found a job in early February, 1998 at the Associated Supermarket on Ogden Avenue. He earned $250 per week and worked until March 4, 1999 when he was offered reinstatement by Respondent.

Respondent argues that Ayala was offered reinstatement in September, 1997, and at that time was asked to present proof of citizenship. However, as set forth below, the September 29 offer of reinstatement was found to be an improper offer inasmuch as it unlawfully required Ayala to present INS documentation.

Respondent's main argument is that Ayala was an illegal alien who possessed no legal authority to work in the United States. Respondent contends that it properly requested his proof of citizenship and when it was not produced had no further obligation to retain him in its employ. Accordingly, Respondent requests that backpay be limited to the period from September

[2] The backpay computations set forth in the Appendix were made based upon the amended Specification and the hearing record.

[3] All the wages set forth herein are gross wages unless otherwise stated.

13, the date of discharge, to mid October, when after a reasonable time after his first reinstatement it was clear that he was an undocumented alien and unable to produce records supporting his legal ability to work in the United States.

General Counsel argues that Respondent's contentions are irrelevant considering the Settlement Stipulation executed by it. By the terms of the Stipulation, Respondent withdrew its answers to the consolidated amended complaint which alleged, inter alia, that on September 13, Respondent unlawfully discharged Ayala, that on September 29, it unlawfully failed to properly reinstate Ayala by requiring him to present INS documentation, and that on October 22, it unlawfully discharged Ayala.[4]

It is thus apparent that Respondent has admitted to violating the Act on September 29 by requiring Ayala to present documentation of his lawful immigration status. In addition, there has been no showing that Respondent made a valid offer of reinstatement prior to March 4, 1999 when backpay was tolled since Ayala refused that offer.

Undocumented aliens are employees under Section 2(3) of the Act and are entitled to the protections and remedies of the Act. *County Window Cleaning Co*., 328 NLRB 190 fn. 2 (1999) In *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 416 (1995), the Board held that backpay to an illegal alien would be tolled either as of the date the discriminatee is reinstated subject to compliance with the employer's obligations under the Immigration Reform and Control Act of 1986 (IRCA) or when, after a reasonable period of time, he fails to produce the documents required by IRCA.

Where an employer hires an employee with knowledge that he is not legally entitled to work in the Untied States, it cannot assert that it would have terminated the employee on the basis of his immigration status. *A.P.R.A.*, supra, at 416; *County*, supra.

However, the Board has held that where an employer can prove that it would not have offered an employee initial employment had it known of his unauthorized immigration status, backpay terminates when the employer first learned that the employee was not legally authorized to work in the United States. *Hoffman Plastic Compounds, Inc*., 326 NLRB No. 86, slip op. at 3 (1998). In such a case, the employer must show that it had a "policy of compliance with IRCA" and further that it did not knowingly hire any employee in violation of IRCA. The employer in *Hoffman* made such a showing through evidence that (a) the employee there fraudulently presented another person's birth certificate upon hire in order to prove his legal status (b) the employee's employment application asked questions concerning his immigration status and (c) there was no evidence that the employer knowingly hired any employee in violation of IRCA.

Respondent here did not make such a showing. Ayala testified that he was never asked for immigration papers upon his hire or at any time during his employment. At the hearing there was testimony that beginning in October, 1997 he was addressed as Miguel Leyva by Respondent. Ayala stated that Leyva was a friend of his who worked at the store in 1996 and 1997. However, there was no evidence that Ayala held himself out as Leyva in order to falsify his immigration status. Accordingly, Respondent was not lawfully concerned about Ayala's immigration status when it hired him or at any time during his employment. As set forth above, Respondent's attempts to ascertain Ayala's immigration status on September 29 and October the Board were found to be unlawful.

I therefore find that backpay continued until March 4, 1999 when an offer of reinstatement was made to Ayala.

Wandy "Joel" Cepeda

Cepeda testified that he earned $280 per week for a 70 to 71 hour, 6 day workweek, and was paid the minimum hourly wage. Following his reinstatement in late September, he was again discharged in late December, 1997. It was stipulated that he earned $2,111.47 in the fourth quarter of 1997. Cepeda testified that in December, 1997, he worked at an Associated Supermarket for 2 days for which he was paid a total of $60. That sum must be added to the stipulated amount of $2111.47, for a total of $2171.47 which represents the amount of fourth quarter 1997 interim earnings. Upon his discharge from Respondent Met in December, he sought work at the Associated store but no work was available.

Cepeda searched for work by visiting stores where he was told work was available. He sought work at supermarkets such as Associated, Key Food, Waldbaum's, and also at hotels including the Marriott in Manhattan, restaurants, bakeries, a bagel store in Brooklyn, Mirage in Manhattan and LaMaya in the Bronx. He visited all such businesses and also searched the classified advertisements in the newspaper and asked his friends if they knew where he could obtain a job.

Cepeda found work on February 23, 1998 as a replacement for his friend at an Associated Supermarket on Webster Avenue in the Bronx. He worked for 4 weeks earning $300 per week or a total of $1200.

Cepeda was unemployed during the second quarter of 1998.

Cepeda next worked at an Associated Supermarket on Ogden Avenue. He worked for 1 month in July,1998, earning $150 to $200. Cepeda worked part time there, whenever he was called to work. His average weekly earnings would therefore be $175 times 4 weeks or $700. While working there, Cepeda visited other businesses in an attempt to find full time work. He went to the Marriott Hotel in Manhattan, LaMaya and Three Way restaurants, and Associated, Bravo, C-Town, and Pioneer supermarkets. He stated that he visited about 20 locations in one week and then did not have enough money for subway fare to continue searching. He visited all the supermarkets that were within walking distance, visiting each one 2 or 3 times.

In August, 1998 Cepeda found work in an Associated Supermarket on Webster Avenue where he worked for about 8 or 9 months, to February or March, 1999. He earned $300 per week. For the months of August and September, which occurred in the third quarter of 1998, the interim earnings computation is $300 per week times 8 weeks or $2400. That sum plus $700 received in July totals $3100 for the third quarter of 1998.

Cepeda continued to work at Associated through February, 1999 at a rate of $300 per week,. Thus, during the fourth quarter of 1998, Cepeda earned $3900. In the 9 weeks constituting the first quarter of 1999 prior to his offer of reinstatement he earned $2700, not the $2400 set forth in the Specification. Cepeda's interim earnings for the fourth quarter of 1998 and the first quarter of 1999 exceeded his gross backpay, and no backpay is due.

Respondent argues that Cepeda's job search was "deficient," stating that he only approached and applied for a couple of

[4] The Stipulation contains a nonadmissions clause which excepts any admissions in Respondent's answer. Inasmuch as the answers have been withdrawn the entire amended complaint stands as admitted.

supermarket jobs and did not follow through on any of his interviews. According to Respondent, Cepeda looked for jobs outside his area of expertise, the supermarket industry.

I do not agree. In addition to the businesses set forth above, where he sought employment, his job search, as noted in his written search for employment form, indicated that from January to April, 1998, Cepeda also visited 2 laundromats, Bravo and C-Town supermarkets, 2 grocery stores, a cleaning establishment and a travel agency. I find, based upon the above, that Cepeda's search for employment was substantial and that he exercised more than reasonable diligence. In addition to looking for jobs in the supermarket industry he expanded his search to include businesses he had not worked in before. From his work in the supermarket, it would appear that Cepeda had generalized skills that could readily transfer to numerous working environments. *Associated Grocers*, 295 NLRB 806, 811 (1989). In addition, he also sought work in the supermarket industry.

Jose de la Cruz

Jose de la Cruz testified that prior to his September 13 discharge he earned $325 per week for a 48-hour week. He did not obtain employment in the 2-week period that he was unemployed between that discharge and his reinstatement in late September. It was stipulated that he earned $995.93 from Respondent in the fourth quarter of 1997. In addition, he earned additional sums from Key Food Pick Quick that quarter. Accordingly, his fourth quarter, 1997 interim earnings are $1360.54, as set forth in the Amended Specification.

De la Cruz was discharged again in early November, 1997. He stated that he looked for work following that discharge. His efforts included speaking to Union representatives about available work, looking in newspapers, inquiring at stores and asking workers who were employed at supermarkets whether their employers were hiring.

In December, 1997, a Union representative took de la Cruz to Key Food Pick Quick Foods, Inc., supermarket, a Union job, and recommended him. De la Cruz obtained a job in the frozen food department, identical to the job at Respondent Met Food. This was a job which offered Union benefits.

De la Cruz worked there about 1 ½ weeks earning a total of $460 during that time. He stated that he left that job because he should have been paid $7.50 per hour but his first check stated that he earned $5.50. He testified that he could have remained employed at $5.50 per hour but did not do so because he was not paid the amount of money the employer agreed to pay. He told the manager that if he would not pay the amount he was told, he would leave. The manager said that he could do so. De la Cruz quit but denied that he did so voluntarily saying he was compelled to leave because the employer breached its agreement concerning the amount of his pay. He did not have another job when he quit.

De la Cruz then searched for work. He visited Domino's Pizza, two Key Food supermarkets, Pioneer Supermarket, a discount store in the Bronx and Waldbaum's Supermarket at which he was told to return. He did so but no job was offered. He also looked in newspapers for job opportunities and called some advertisers. He had a telephone interview with the United Parcel Service, and he filled out an application for a maintenance position with Columbia University. He also visited many other stores, most being supermarkets. At some of the above businesses, de la Cruz completed applications when he was given them.

In about March, 1998, de la Cruz found a job at the Associated Supermarket on Valentine Avenue in the Bronx where he worked more than 2 months. He was paid $250 per week. The W-2 form for that employer stated that he earned total wages of $3914 during his employment there. He left that job because the owner sold the store and discharged most of the workers. He stated that he was asked to leave because the new owner wanted a "change of personnel." The owner was satisfied with his job performance. He was dismissed in about July, 1998.

In about June, de la Cruz worked at the New York Road Runners Club for 2 weeks where he dispensed water to marathon runners. He earned total wages of $487.50.

Thereafter, de la Cruz worked for about 2 weeks in about August, 1998 for Shop Smart earning $280 per week or $560 for the 2 weeks off the books.[5] He stated that he was asked to leave. He apparently asked that his employment be on the books but the employer refused. He left in about September.

De la Cruz' next job was at the Alamar grocery store where he worked for 2 months in late October and early November, 1998. He earned $125 per week, or a total of about $1000.

Thus, the total interim earnings for the first 3 quarters of 1998 are, respectively, $3914, $1047.50 (comprised of $487.50 and $560), and $1,000.

On November 16, de la Cruz began work at Telebeam Communications, where he is still employed. He earns $350 to $365 per week, but is paid by the hour depending upon how many hours he works. At the start of that employment he was in training for 2 months during which time he earned $6.00 per hour. His W-2 form for 1998 listed total wages as $1473.

Respondent asserts that de la Cruz's backpay should be tolled when he quit the job at Key Food Pick Quick. Respondent argues that his salary at Key Food was substantially similar to that at Respondent Met Food and accordingly he could not have been dissatisfied with the $5.50 hourly wage received at Key Food. Respondent is incorrect in claiming that de la Cruz testified that the hourly wage promised was $7.00. In fact, it was $7.50. Respondent calculates his hourly wage at Met Food at $6.25. That calculation was done by dividing his weekly wage of $325 by 52 hours per week. However, de la Cruz stated that the most hours he worked was 52, and the least he worked was 48. Accordingly, the appropriate average weekly hours is 50. His weekly wage of $325 divided by 50 is $6.50 per hour. Thus, de la Cruz earned $6.50 per hour at Respondent Met Food. His claim is that he earned only $5.50 per hour at Key Food, which is a $1.00 reduction from his wages at Met and $2.00 less than he had been promised at Key Food.

Respondent asserts that de la Cruz should have realized that he would be eligible for a raise in pay pursuant to the Union contract and stayed at that job. However, there was no proof that he was eligible for a raise, that he would have received a raise, or that the Union told him of such eligibility.

It is somewhat disingenuous for Respondent to argue that de la Cruz should have remained in lower paying employment when he left because he was not being paid a higher amount. By leaving this job he sought higher paying work which would have benefited Respondent by increasing his interim earnings. Of course, in hindsight, we see that de la Cruz was not successful in finding other employment for 2 or 3 months, but his rea-

[5] General Counsel erroneously asserts that de la Cruz earned a total of $280 for both weeks. De la Cruz testified several times that he earned $280 per week and I accept that testimony.

son for leaving that job, for higher pay, did not constitute a willful loss of earnings.

Respondent asks why de la Cruz left a Union job paying Union wages. That question has not been satisfactorily answered and it is Respondent's burden to prove a willful loss of earnings, which it has not done.

The Board has held that "a discriminatee who, without good cause, quits a comparable job with an interim employer has thereby incurred a willful loss of earnings warranting a reduction in backpay. A discriminatee, however is under no obligation to retain nonequivalent employment." *Glover Bottled Gas Corp*., 313 NLRB 43 (1993). I find, accordingly, that the job at Key Food was not equivalent to that he held at Respondent Met. The wages were $1.00 less per hour at Key Food, and de la Cruz was under no obligation to retain such employment.

Respondent also asserts that his quit at Shop Smart after working only 2 weeks because he was not happy at being paid off the books constitutes a willful loss of earnings. Respondent argues that since de la Cruz worked off the books at Respondent Met Foods he should have accepted similar terms at Shop Smart. No explanation was given as to why de la Cruz was not satisfied with being paid off the books. One can only speculate that his reason was that he wanted his employment to be made a matter of record so that the proper taxes were deducted from his pay for the payment of government benefits.

There was testimony that de la Cruz may have been discharged from his interim employment at Associated Supermarket on Valentine Avenue, and at Shop Smart. A discharge from interim employment, without more, does not constitute a willful loss of employment. As set forth in *Ryder System*, 302 NLRB 608, 610 (1991):

> A respondent must show deliberate or gross misconduct on the part of the discharged employee in order to establish a willful loss of employment. Here we find that the Respondents failed to show that Larry Elmore's conduct fell within that standard. Elmore may have missed several scheduled deliveries, but he committed no offense involving moral turpitude and his conduct was not otherwise so outrageous as to suggest deliberate courting of discharge. Without such proof, Elmore's discharge from ATS will not serve as a basis for tolling his backpay.

The Board has found that discharges for the following reasons did not toll backpay: (a) failure to call in or appear for work (b) refusing to work on Sundays (c) discharge for incarceration (d) unsatisfactory performance (e) argument with supervisor over working conditions. *La Favorita, Inc.*, 313 NLRB 902, 903-904. (1994).

I accordingly find that even if de la Cruz was discharged from his employment at Associated Supermarket and at Shop Smart, the reasons for his discharge did not constitute such conduct as would toll his backpay. *Ryder*, supra.

Marisol Chavez Frias

Frias worked as a cashier at Met Food. She first testified that prior to September 13 she earned $220 to $230, or an average of $210 per week at $5.15 per hour working 7 hours per day, 6 days per week. Based upon the above, the amended Specification alleged that Frias' gross backpay was $216.30 per week (42 hours per week times $5.15 per hour).

However, Frias also stated that when work was slow she went home early and did not work a full week. She further testified that she often worked different hours during the week, and averaged perhaps 35 hours per week for which she earned about $172. Frias identified her timecards for the weeks of September 6 and 13.[6] The card for September 6 indicated that she worked 42 hours at an hourly rate of $5.15, receiving weekly pay of $216.30. The card for September 16 indicated that she worked 33 ½ hours and received pay of $172.52.

Respondent asserts that inasmuch as Frias stated that she earned $172 per week, her gross backpay must be based upon that amount, and not on $216.30 as set forth in the Specification.

The only uncontroverted, documentary evidence in the record concerning this matter are the 2 timecards. I cannot accept General Counsel's gross backpay figure of $216.30 as Frias' average weekly earnings because she stated that her hours of work were 8:00 a.m. to 3:00 p.m., which is confirmed by the 2 timecards. Thus, she stated specifically that she worked those 7 hours 6 days per week. Accordingly, 42 hours per week appears to be her regular hours, and also the maximum hours that she would have worked. Based upon Frias' testimony that occasionally she worked fewer hours (which is supported by the time card for September 16 – 33 ½ hours) I cannot find that she always worked 42 hours per week as set forth in the Specification. Nor can I find, as argued by Respondent, that her weekly pay should be calculated at $172 (which would be approximately 33 ½ hours) since it has been established that she worked 42 hours.

Therefore, I believe that a proper calculation would be the average of $172.52, the amount she earned during the week of September 16 and $216.30, the amount she earned during the week of September 6. Thus, the average of those weeks is $194.41. Accordingly, gross weekly backpay of $194.41 will be substituted for $216.30 for the entire backpay period.

It was stipulated that Frias earned $1364.98 in the fourth quarter of 1997.

Following her second discharge in late November, 1997, Frias found work in the middle of December as a cashier at the Associated Supermarket on Ogden Avenue. She worked there less than 5 days. She was released because the person she replaced returned to work or because someone told the manager that he saw her and another employee "associating." Frias did not recall how much money she earned in that job.

Thereafter, Frias was out of work for about 3 months. During that time she visited stores such as C-Town and Aim supermarkets near her home. She also visited a department store and a clothing store. She conceded that she did not go to too many stores and limited her search to the Bronx, claiming that she had no money for transportation to search for work. She also stated that she did not visit various supermarkets nearby Respondent Met Food because she "did not want to go around there" and did not want to visit places "far away" where she had to use public transportation.

Respondent argues that Frias unreasonably limited her job search citing *Continental Insurance Co.*, 289 NLRB 579 (1988). That case is inapposite. The employee refused an offer of similar employment because it was too far to travel. The Board, in denying the claimant backpay, framed the issue as a refusal to accept an offer of similar employment and not in terms of the reasonableness of limiting her job search. Here, in contrast, Frias was not offered a similar job while she was out

[6] A third timecard which was undated has not been considered as it is unreliable.

of work. I cannot find that Frias unreasonably limited her job search. Although it is true that she later found work in a supermarket far from her home, I cannot find that she did not engage in a reasonably diligent search for work. Thus, she visited 2 supermarkets, a department store and a clothing store. When her search for work is looked at as a whole it is clear that she engaged in a proper search for work.

In March, 1998, Frias found work at C-Town supermarket. She stated that that job was not close to her home – in fact it was "pretty far away." She worked there during May and June, 1998, earning the minimum wage of $5.15 per hour. Frias worked part time, 5 to 6 hours per day, 5 to 6 days per week. The first quarter 1998 calculation for such employment is 25 ½ hours per week times $5.15 per hour equaling $141.62 times 8 weeks or $1132.96, and not the $659.20 set forth in the amended Specification. She stated that she left because she "did not want to work there no more. No reason. I did not want to stay that long in a supermarket" and "did not want to be there." Frias stated that another reason for her leaving C-Town was that it was too far from her home.

Frias was out of work only a few days when she began work at Rockbottom Stores, where she was employed about 2 months, from July 26 to late September. That store was located far from her home. She worked part time, earning $5.15 per hour. She enjoyed her job at Rockbottom more than at C-Town because she did not work on Sunday. The calculations for that employment, as set forth in the paystubs for Rockbottom and Duane Reade reflect third quarter 1998 earnings of $1,340 and not $649.16, the amount set forth in the amended Specification.

Frias left Rockbottom and immediately began work, on October 5, 1998 at the Archdiocese of New York where she continued to be employed through the end of her backpay period, March, 1999. She began as an assistant bookkeeper trainee earning $8.00 per hour, working from 8:30 a.m. to 2:00 p.m., Monday through Thursday.

Respondent argues that Frias' voluntary quitting of the C-Town job constitutes a willful loss of earnings, contending that had she remained at C-Town she would not be entitled to back pay thereafter because her weekly wage was more than she earned at Respondent. However, she earned more at Respondent where she worked full time, than at C-Town where she was part time working fewer hours at the same rate of pay.

The issue is thus whether Frias quit a comparable job without good cause. *Glover*, supra. First, in agreement with Respondent, I find that Frias quit the C-Town job without good cause. She could give no valid reason for quitting. She did not say that she sought to improve her salary or type of work.

However, although the nature of the work performed at C-Town was similar to that which she performed at Respondent, I cannot find that the C-Town job was a "comparable" job. Her wages at C-Town were far less than she received at Respondent. She earned $216.30 per week at Respondent and only $141.62 at C-Town. Thus, I cannot find that her job at C-Town was equivalent to her job with Respondent which precluded her from quitting without cause. Moreover, it should be noted that after she quit the C-Town job, she secured employment within a few days with Rockbottom and then upon leaving that job immediately obtained a far better paying job with the Archdiocese. *Glover*, supra.

Jose Frometa

Frometa's testimony concerning his pre-strike earnings was far from clear. He testified that prior to his discharge on September 13, he always earned $359 per week, but then stated that he was never paid $359 per week. Then he conceded that $359 was the maximum amount he earned, and when he worked fewer hours he earned less, the least amount earned being $270 to $280 per week. Then he stated that that latter range was his wage during that time period.

Frometa also testified that he worked for Pioneer Supermarkets at which he earned $359 per week, for some period of time before the strike. Then he was transferred to Respondent Met Food and worked there for only 1 or 2 weeks before the September 13 strike.

General Counsel argues that inasmuch as Pioneer was owned by the same person who owned Respondent Met Food, Nelson Diaz, and since Frometa was transferred to Met in an effort to "pack the unit" at Met, Frometa's pre-strike wage should be calculated at $359 per week because but for the strike he would still have been employed at Pioneer.

However, such a proposition is not supported by the evidence. The Settlement Stipulation did not name Pioneer as a party, does not mention Pioneer, and there is no reference to an alleged attempt to pack the Met Foods unit with Pioneer employees. It is General Counsel's burden to prove gross backpay. *Basin Frozen Foods*, 320 NLRB 1072, 1074 (1996). I do not believe that General Counsel has proven that Frometa earned or would have earned $359 per week while employed at Met Food prior to his September 13 discharge.

The most that can be discerned from Frometa's testimony is that he earned $359 per week at Pioneer, and then upon his transfer to Met prior to the September 13 discharge he earned $270 to $280 per week at Met Food. I accordingly find that Frometa earned $275 per week while employed at Met prior to the September 13 discharge, and I shall amend the backpay calculations to state that Frometa's gross backpay was $275 for the 10 weeks set forth in the Specification.

Frometa was not questioned concerning his search for work during the 2-week period from his discharge to his reinstatement in late September. However, the Specification sets forth that his interim earnings during that period was $334 and I accept that figure.

It was stipulated that Frometa received $1,523.08 during the fourth quarter of 1997. General Counsel asserts in his brief that Frometa voluntarily quit Respondent's employ on about November 28, 1997. Accordingly, Frometa is not entitled to backpay following the fourth quarter of 1997.

Juan Lopez

Lopez testified that at the time of his discharge on September 13, he earned $290 per week for a 69 to 72 hour week. He was employed for 5 years before his termination. Upon his reinstatement in late September, 1997, his hours were reduced to 4 per day or 28 per week, and he earned about $136 to $150 per week. The parties stipulated that during the fourth quarter of 1997, Lopez earned $1468.34.

Lopez was again discharged on December 14. He stated that following his firing, he looked for work in the area in which he lived. He went to Pathmark and National supermarkets in the Bronx and a discount store in Manhattan. He could not recall other places he visited. He stated that he did not look for work at any businesses other than those three and did nothing else to look for work.

Lopez became employed in early February, 1998 at an Associated Supermarket on Ogden Avenue in the Bronx where he is still employed. He earns $5.15 per hour for a 5 hour workday.

He works 5 days per week which is the amount he earned from the start of his employment until the hearing. Accordingly, beginning with the second quarter of 1998, his weekly interim earnings have been $128.75 or $1673.75 per quarter. Lopez did not seek to work any extra hours at Associated. He stated that he received no other income during the backpay period, although even after he obtained that job he searched for work, including at a supermarket in Manhattan. However, he was not offered any other positions.

It was stipulated that the backpay period ends on March 4, 1999.

Respondent argues that Lopez should be disqualified for backpay as he intentionally incurred a willful loss of earnings by not seeking full time work following his employment in a part time position at Associated in February, 1998. Lopez testified, however, that he sought work at a Manhattan supermarket after obtaining this position. Respondent contends that he engaged in no "meaningful search" for work, maintaining that following his full time employment with Respondent he had an obligation to find a similar position with the same number of hours he was employed at Respondent.

McCann Steel Co., Inc. v. NLRB, 570 F.2d 652, 655 (6th Cir. 1978) is cited by Respondent on the issue of willful loss of earnings. In that case, the court overruled the Board's decision. First, I am bound by Board decisions and not those of circuit courts. *Hillhaven Rehabilitation Center*, 325 NLRB 202 fn. 3 (1997). Second, in *McCann*, the court found that at the employee's interim employer "overtime was readily available … [but the employee] did not always choose to take advantage of it." The court found that inasmuch as the employee worked overtime at the respondent's business but did not work available overtime at the interim employer, he engaged in a willful loss of earnings, finding that he "refused to work the same number of hours at his interim employer as he had worked at McCann."

McCann is readily distinguishable. There was no evidence that there were additional hours available to be worked at Associated. One other discriminatee, Miguel Ayala, testified that he began work at that store at the same time as Lopez. Ayala earned $250 per week, or about double the amount earned by Lopez. The record contains no explanation for the difference. Unlike *McCann*, there was no proof here that additional hours were available for Lopez and that he refused to work more hours. In addition, it is Respondent's burden to prove that he could have worked more hours at Associated. *Acme Bus Co.*, 326 NLRB No. 157 slip op. at 1 (1998); *United States Can Co.*, 328 NLRB No. 45, slip op. at 15-16 (1999), or that he could have obtained a full-time job had he continued looking, or that he was offered but refused to accept full-time employment. Under these circumstances, Lopez should not be penalized for failing to continue looking for full-time employment after obtaining the part-time job. *United States Can*, supra slip op. at 16.

Although Lopez searched for work at only 3 stores, he was out of work for only 1 ½ months, and I find that he exercised reasonable diligence in searching for work. Respondent has not met its burden of proving that Lopez failed to exercise reasonable diligence in searching for work.

Francisco Urena

Urena testified that prior to his discharge on September 13, he earned $260 per week for which he worked 10 to 13 hours per day, 6 days per week.

Urena was not asked and did not testify about a search for work or the receipt of interim earnings from September 13 through September 29 when he was reinstated. Inasmuch as it is Respondent's burden to show deductions from gross pay, I find that it has not established that any deductions from gross backpay should be made for that 2 week period.

Urena testified that upon his reinstatement on September 29, his gross pay was about $208 to $210 per week. However, the parties stipulated that Urena's earnings in the fourth quarter of 1997 totaled $2,394.34. Inasmuch as there were 13 weeks that quarter, Urena's weekly earnings would be $184.18. He earned the same amount until early March, 1999, when Respondent Bafter became the owner, and Urena then received $265 per week.

For the first quarter of 1999, Urena earned $184.18 weekly from January 1, 1999 through the first week of March, 1999 (March 5) and then earned $265 for the remainder of March.

General Counsel argues that Urena is entitled to receive backpay for the entire month of March notwithstanding that his wage rate increased to $265 in early March. Respondent argues that Urena's backpay must end in early March because at that time his wages exceeded his pre-backpay weekly earnings of $260.

I agree with General Counsel. Backpay computations are made on a quarterly basis and not a weekly basis. Thus, the entire first quarter of 1999 is considered in making backpay calculations. *Woodline Motor Freight*, 305 NLRB 6, 9 (1991); *F.W. Woolworth Co.*, 90 NLRB 289, 293 (1950).

Accordingly, Urena's interim earnings were $184.18 per week or $2394.34 for each of the quarters from the fourth quarter of 1997 through the fourth quarter of 1998.

The first quarter of 1999 must be separated into 2 parts since Urena earned 2 different salaries during that quarter. In the 9-week period from January 1 through March 5, Urena earned $184.18 per week or $1657.62 for the 9 weeks. In the remaining 4 weeks of March, Urena's salary increased to $265 per week or $1060 for the 4 weeks. The total of those 2 sums, first quarter interim earnings is $2717.62.

Urena is not entitled to backpay for the period beginning the second quarter of 1999 and thereafter inasmuch as his weekly salary of $265 or quarterly earnings of $3445 exceeded his gross backpay of $3380.

ORDER

The Respondents, 256 Food Corporation d/b/a/ Met Food, and its *Golden State* Successor, Bafter Food Corporation, their officers, agents, successors, and assigns, shall make the employees named in the attached Appendix whole by paying to them the sums set forth in the column entitled Total Net Backpay for each of the employees, with interest on such amounts to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

Dated, Washington, D.C. February 16, 2000

APPENDIX

Domingo Almonte

Year	Quarter	Weeks	Weekly Wages	Gross Backpay	Interim Earnings	Net Backpay
1997	3rd	2	$325.00	$650.00	$0	$650.00.
	4th	13	325.00	4225.00	2288.26	1936.74
1998	1st	13	325.00	4225.00	3535.52	689.48
	2nd	13	325.00	4225.00	5643.56	0
	3rd	13	325.00	4225.00	5643.56	0
	4th	13	325.00	4225.00	5643.56	0
1999	1st	9	325.00	2925.00	3884.58	0
			Total Net Backpay			$ 3276.22

Pascual Alonzo

Year	Quarter	Weeks	Weekly Wages	Gross Backpay	Interim Earnings	Net Backpay
1997	3rd	2	$185.00	$370.00	$0	$370.00
	4th	13	185.00	2405.00	1413.61	991.39
1998	1st	13	185.00	2405.00	1908.14	496.86
	2nd	13	185.00	2405.00	1908.14	496.86
	3rd	13	185.00	2405.00	1908.14	496.86
	4th	13	185.00	2405.00	1908.14	496.86
1999	1st	13	185.00	2405.00	1908.14	496.86
	2nd	13	185.00	2405.00	1908.14	496.86
	3rd	13	185.00	2405.00	4550.00	0
			Total Net Backpay			$ 4342.55

Miguel Ayala

Year	Quarter	Weeks	Weekly Wages	Gross Backpay	Interim Earnings	Net Backpay
1997	3rd	2	$300.00	$600.00	$0	$600.00
	4th	13	300.00	3900.00	545.27	3354.73
1998	1st	13	300.00	3900.00	250.00	2650.00
	2nd	13	300.00	3900.00	3250.00	650.00
	3rd	13	300.00	3900.00	3250.00	650.00
	4th	13	300.00	3900.00	3250.00	650.00
1999	1st	9	300.00	2700.00	2250.00	450.00
			Total Net Backpay			$9004.73

Wandy Cepeda

Year	Quarter	Weeks	Weekly Wages	Gross Backpay	Interim Earnings	Net Backpay
1997	3rd	2	$280.00	$560.00	$0	$560.00
	4th	13	280.00	3640.00	2171.47	1468.53
1998	1st	13	280.00	3640.00	1200.00	2440.00
	2nd	13	280.00	3640.00	0	3640.00
	3rd	13	280.00	3640.00	3100.00	540.00
	4th	13	280.00	3640.00	3900.00	0
1999	1st	9	280.00	2520.00	2700.00	0
			Total Net Backpay			$ 8648.53

Jose de la Cruz

Year	Quarter	Weeks	Weekly Wages	Gross Backpay	Interim Earnings	Net Backpay
1997	3rd	2	$325.00	$650.00	$0	$650.00
	4th	3	325.00	4225.00	1360.54	2864.46
1998	1st	13	325.00	4225.00	3914.00	311.00
	2nd	13	325.00	4225.00	1047.50	3177.50
	3rd	13	325.00	4225.00	1000.00	3225.00
	4th	13	325.00	4225.00	1473.00	2752.00
1999	1st	9	325.00	2925.00	4006.80	0
			Total Net Backpay			$12979.96

Marisol Chavez Frias

1997	3rd	2	$194.41	$388.82	$0	$388.82
	4th	13	194.41	2527.33	1364.98	1162.35
1998	1st	13	194.41	2527.33	1132.96	1394.37
	2nd	13	194.41	2527.33	0	2527.33
	3rd	13	194.41	2527.33	1340.00	1187.33
	4th	13	194.41	2527.33	2226.22	301.11
1999	1st	9	194.41	1749.69	1584.00	165.69
			Total Net Backpay			$ 7127.00

Jose Frometa

Year	Quarter	Weeks	Weekly Wages	Gross Backpay	Interim Earnings	Net Backpay
1997	3rd	2	$275.00	$550.00	$334.00	$216.00
	4th	8	275.00	2200.00	1523.08	676.92
			Total Net Backpay			$892.92

Juan Lopez

Year	Quarter	Weeks	Weekly Wages	Gross Backpay	Interim Earnings	Net Backpay
1997	3rd	2	$290.00	$580.00	$ 0	$580.00
	4th	13	290.00	3770.00	1468.34	2301.66
1998	1st	13	290.00	3770.00	1158.30	2611.70
	2nd	13	290.00	3770.00	1673.75	2096.25
	3rd	13	290.00	3770.00	1673.75	2096.25
	4th	13	290.00	3770.00	1673.75	2096.25
1999	1st	9	290.00	2610.00	1158.75	1451.25
			Total Net Backpay			$13233.36

Francisco Urena

Year	Quarter	Weeks	Weekly Wages	Gross Backpay	Interim Earnings	Net Backpay
1997	3rd	2	$260.00	$520.00	$0	$520.00
	4th	13	260.00	3380.00	2394.34	985.66
1998	1st	13	260.00	3380.00	2394.34	985.66
	2nd	13	260.00	3380.00	2394.34	985.66
	3rd	13	260.00	3380.00	2394.34	985.66
	4th	13	260.00	3380.00	2394.34	985.66
1999	1st	13	260.00	3380.00	2717.62	662.38
	2nd	13	260.00	3380.00	3445.00	0
			Total Net Backpay			$6110.68